No. 12,770

IN THE

United States Court of Appeals

For the Ninth Circuit

ETTORE G. STECCONE, an individual doing business under the firm name and style of STECCONE PRODUCTS CO.,

Appellant,

vs.

MORSE-STARRETT PRODUCTS CO., a corporation,

Appellee.

Brief for Ettore G. Steccone

NAYLOR AND LASSAGNE
JAS. M. NAYLOR
Russ Building
San Francisco 4, California
Attorneys for Appellant.

FRANK A. NEAL
Of Counsel.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

No. 12,770

IN THE

United States Court of Appeals

For the Ninth Circuit

ETTORE G. STECCONE, an individual doing business under the firm name and style of STECCONE PRODUCTS CO.,

Appellant,

vs.

MORSE-STARRETT PRODUCTS CO., a corporation,

Appellee.

Brief for Ettore G. Steccone

JURISDICTIONAL STATEMENT

The basic action,* out of which this appeal arises, was one for trade mark infringement and unfair competition, jurisdiction having been based on the Trade Mark Laws of the United States (15 U.S.C.A., Chap. 22). The Findings

*The Memorandum Opinion of the District Court, following trial on the merits, is reported in *Morse-Starrett Products Co. v. Steccone,* 86 F.S. 796, 83 U.S.P.Q. 496.

of Fact and Conclusions of Law appear at Tr. pp. 3-14, inclusive, and the original Judgment, which was filed and entered January 11th, 1950 and became final for lack of appeal, appears at Tr. pp. 14-17, inclusive.

The proceedings after judgment leading to the filing of this appeal were as follows: On July 20th, 1950 appellee filed a Petition for Order to Show Cause (Tr. pp. 17-27) as to why appellant should not be held in contempt of the District Court's Judgment of January 11th, 1950. Following a hearing* on the Order to Show Cause, the District Court handed down its Memorandum Opinion (Tr. pp. 96-97) adjudging that appellant had violated said original Judgment in certain respects and a notation of an Order and a notation of the Memorandum Opinion were entered, in the sequence noted, in the Civil Docket by the District Court Clerk (Tr. pp. 130-131). On October 6th, 1950 the District Court entered an Order for Writ of Execution (Tr. pp. 97-98). Thereafter appellant filed a Motion to Recall, Quash or Stay Writ of Execution and for Entry of Final Judgment (Tr. pp. 99-100) which, after hearing† was denied in an Order dated November 9th, 1950 (Tr. p. 126).

This appeal (Tr. p. 127) from the Order of November 9th, 1950, sanctioned by 28 U.S.C.A. 1291, followed.

STATEMENT OF THE CASE

The root subject matter of this controversy is the surname "STECCONE" which, at one and the same time, is the appellant's heritage and appellee's trade mark, the lat-

---

*The Reporter's Transcript of the hearing appears at Tr. pp. 69-95.

†The Reporter's Transcript of the hearing on the motion appears at Tr. pp. 101-125.

ter by virtue of the judicial reasoning indicated at length in the earlier, reported District Court decision (86 F.S. 796).

The Judgment on the merits of the case (Tr. pp. 14-17) provided for a writ of injunction proscribing appellant's use of the word "STECCONE," *per se,* but at the same time contained certain permissives relative to appellant's use of his surname in the identification of his goods* and business. The alternative aspects of the Judgment are contained in Paragraph XIII of the Judgment (Tr. pp. 16-17).

On July 20th, 1950 appellee filed a Petition for Order to Show Cause (Tr. pp. 17-27) why appellant should not be held for contempt of the District Court's Judgment in the uses of the surname "STECCONE" typified by, *inter alia,* Exhibits 2, 3 and 4 before the District Court. The proceedings had at the hearing thereon appear at Tr. pp. 69-96. On July 31st, 1950 the District Court handed down its Memorandum Opinion (Tr. pp. 96-97) adjudging that appellant had violated the original Judgment in certain respects. Notations of an Order and a notation of the Memorandum Opinion, in that sequence, were entered in the Civil Docket of the District Court Clerk (Tr. pp. 130-131).

There were no Findings of Fact, Conclusions of Law or Judgment proposed for settlement and entry by the Court to implement the Memorandum Opinion.

On October 6th, 1950 the District Court issued and there was entered in the Civil Docket an Order for Writ of Exe-

---

*For the Court's enlightenment it should be pointed out the products with which both parties are concerned are window-washers' squeegees, i.e., the devices employed by building maintenance men and janitors in cleaning glass and like polished surfaces by repeated swipings, to remove wash water or solutions applied thereto, and the replacement rubber blades therefor.

cution (Tr. pp. 97-98). Three (3) days later, or on October 9th, 1950, appellant filed a Motion to Recall, Quash, Stay Execution and for Entry of Judgment, lodging therewith proposed Findings, Conclusions and Judgment. On November 9th, 1950 the District Court denied the Motions to Recall Writ of Execution and for Entry of Final Judgment and on November 13th, 1950 appellant filed his Notice of Appeal from the last mentioned Order.

On February 19th, 1951 appellee brought before this Court a Motion to Dismiss the appeal. After hearing, the Court ordered the said Motion to Dismiss continued for hearing with the cause on the merits.

The present appeal raises for determination the question whether the District Court entered a *final, appealable Order* or *Judgment* on the July 20th, 1950 Petition for Order to Show Cause. More specifically, did the Memorandum Opinion handed down on July 31st, 1950 constitute a final, appealable order or was it simply a decision advisory in nature and to be implemented by Findings of Fact, Conclusions of Law and a Judgment, as called for in the rules?

SPECIFICATION OF ERRORS

The errors of the District Court which appellant will urge in this Court are as follows:

The Court erred in treating its Memorandum Opinion of July 31st, 1950 as a final, appealable order and in denying appellant's Motion to Enter Final Judgment.

SUMMARY OF THE ARGUMENT

According to the conventional tests, the Memorandum Opinion handed down by the District Court on July 31st, 1950 was not a *final, appealable order.*

This is so because the Memorandum Opinion (Tr. pp. 96-97) purports to do nothing more than state legal conclusions that:

> "exhibits 2, 3 and 4 attached to the affidavit of Leon Paul in support of plaintiff's claim that the defendant has not complied with the judgment of this Court *are violative of that judgment.*" (Emphasis supplied.)

The antecedent use of the phrase "I find" does not, *ipso facto,* convert what is otherwise plainly a legal conclusion into a finding of fact. That the quoted portion of the Memorandum Opinion is a legal conclusion, and nothing more, is demonstrated by the total absence of a recital of particular facts concerning the nature, extent and substance of the violation.

Nor is the Memorandum Opinion converted into a *final, appealable order* by the mere presence of the following paragraph therein:

> "I further find that defendant has not complied with the order of this Court requiring him to indicate on the squeegees and the handles thereof manufactured and sold by him that they are not the product of Morse-Starrett Products Co."

because that is conclusion also and it differs in kind from the proscription of the original judgment on the merits (Tr. pp. 16-17).

Thus, the Memorandum Opinion fails to meet the first test as to finality and appealability in that it asserts mere legal conclusions.

The next test of the sufficiency of the Memorandum Opinion as to finality and appealability is whether it satisfies

R.C.P. Rule 58 and Rule 5* of the Rules of Practice for the District Court of the United States, Northern District of California, supplementing the Federal Rules of Civil Procedure.

A contempt proceeding, involving constructive contempt, does not differ in any material respect from proceedings on the merits, and hence a decision therein, involving the interpretation and sufficiency of evidence, must be implemented by findings of fact, conclusions of law and judgment, to satisfy the rules of practice.

Since the pertinent rules do not, in letter or spirit, exclude decisions of the courts in contempt proceedings, it must follow that a Memorandum Opinion giving an order is one which requires settlement and approval as to form and the lodging, successively, of proposed findings of fact, conclusions of law and a draft of the judgment.

ARGUMENT

The Necessity for Findings, Conclusions and Judgment in Cases Involving Constructive Contempt.

In trade mark and unfair competition cases the order to show cause why a party should not be adjudged in contempt, as here, brings before the court some marking of goods, adopted subsequent to the judgment on the merits, and involves a comparison of the latest form of marking with the proscriptions (and here, the permissives) of such judgment on the merits. It is at once indicated that when a decision has been handed down in a case of such constructive contempt, the need for findings, conclusions and

---

*For the Court's convenience, the pertinent subdivisions of Rule 5 are printed in an appendix hereto.

judgment is imperative. In this way alone can the record be constituted for proper review.

In the instant case the need for findings of fact and conclusions of law and a settled form of judgment is readily demonstrated.

The judgment on the merits provided, in part, as follows:

"XIII

> That a writ of injunction issue out of and under the seal of this Court enjoining and restraining the defendant, his associates, attorneys, employees, servants, agents, and those in privity with him, or them, from in any manner using the trade-name 'Steccone' enclosed by an oval in connection with squeegees, or the handles thereof, and from so using the name 'Steccone' that reasonably attentive purchasers cannot readily distinguish between the products of plaintiff and defendant, provided, however, that defendant may make, advertise and sell squeegees as the products of the Steccone Products Co., or as defendant's product, so long as the name 'Steccone', used alone or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff."

It will be seen that the quoted part of the judgment forbids absolutely the use of:

> "the trade name 'Steccone' enclosed by an oval in connection with squeegees, or the handles thereof"

and further qualifiedly enjoins appellant:

> "from so using the name 'Steccone' that reasonably attentive purchasers cannot readily distinguish between the products of plaintiff and defendant"

concluding with the proviso:

> "that defendant may make, advertise and sell squeegees as the products of the Steccone Products Co., or as defendant's product, so long as the name 'Steccone', used alone or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff."

The exhibits (2, 3 and 4) scrutinized by the District Court on the order to show cause had, of course, to be compared with this multi-faceted judgment in order to determine whether the markings thereon were violative of the absolute proscription or the conditional injunction or were within the bounds of the proviso thereof. Upon being so compared and interpretated it would follow that a final ruling thereon should be most explicit in stating the particular facts and circumstances of the contempt, to the end that a review as to the sufficiency may be had, to say nothing of the need for a clear directive to the contemnor.*

Here, however, the District Court merely found (in the sense of concluding or deciding) that exhibits 2, 3 and 4 were violative of the judgment and that the defendant had not complied with the order of the Court requiring him to indicate on the squeegees and the handles thereof manufactured and sold by him that they are not the products of

---

*A typical example of findings of fact and conclusions of law in an unfair competition case, setting forth the facts of the violation with the desired particularity, is to be noted in *Camille, Inc. v. F. W. Fitch Company*, 30 F.S. 532, 43 U.S.P.Q. 375. Note especially the complete compatibility between the language of the original decree and the finding relative to the contempt.

Morse-Starrett Products Co., without a statement of any kind as to the particular facts and circumstances.

At 17 C.J.S. § 88 (pp. 129-130) the following appears:

> "Many authorities hold that the warrant of commitment in either direct or constructive contempts should state the particular facts on which the order is founded, including sufficient facts to show the court's authority, in order that a review as to the sufficiency may be had."

and the footnote at p. 130 thereof contains this statement:

> "(1) Whether contempt is criminal or civil contempt, order for commitment must state circumstances of contempt, it being insufficient merely to assert legal conclusion that contemnor violated, or instigated violation of mandate of court."

In re Lake, 65 Cal. App. 420, indicates the necessity for findings of fact rather than mere conclusions in judgments on contempt.

The necessity of findings of fact and law, in contempt proceedings, is further indicated at 17 C.J.S. § 124 (p. 168) where reviewability of the evidence in order to determine whether there is any competent evidence to support the "findings," is discussed.

It is respectfully submitted, therefore, that here there was a plainly indicated need for findings, conclusions and a settled judgment in order to serve the necessities of the case and the ends of justice.

Thus, the Memorandum Opinion fails to meet a further test as to finality.

The Memorandum Opinion Filed Herein Did Not Satisfy the Rules Requiring Entry of Judgment.

When analyzed, the Memorandum Opinion of July 31, 1950 (Tr. pp. 96-97), will be found to be a mere directive for "entry of judgment for other relief" as to which R.C.P. Rule 58 requires that:

> "* * * the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk."

Under similar circumstances this Court has construed the rules (R.C.P. Rule 58) as requiring an "entry of judgment" and refused to treat the mere filing of an *opinion* as meeting this requirement (see *Uhl v. Dalton,* 151 F.(2d) 502).

In deciding the *Uhl* case as it did, this Court was but following the better reasoned authorities on this same proposition. Thus, in *In re D'Arcy,* 142 F.(2d) 313, 315 (C.A. 3), it was said:

> "In the federal courts an opinion is not a part of the record proper. England v. Gebhardt, 1884, 112 U.S. 502, 506, 5 S.Ct. 287, 28 L.Ed. 811. *Consequently, a statement in an opinion of the conclusion reached by the court, even though couched in mandatory terms, cannot serve as the order or judgment of the court. It is necessary that a definitive order or judgment be made and entered in the court's docket in due form.* In Alleghany County v. Maryland Casualty Co., 3 Cir., 1943, 132 F.(2d) 894, 897, certiorari denied 318 U.S. 787, 63 S.Ct. 981, 87 L.Ed. 1154, we pointed out the vital importance of a court's judgment being clear and unambiguous. For similar reasons Civil Procedure Rule 79a, requires that all orders and judgments of the district court in civil actions shall be noted in the docket on the folio assigned to the action and Rule

58 provides that the notation of a judgment in the docket as provided by Rule 79a shall constitute the entry of the judgment and that the judgment shall not be effective before such entry." (Emphasis supplied.)

In *St. Louis Amusement Company v. Paramount Film Distributing Corp.*, 156 F.(2d) 400 (C.A. 8), the Court observed:

> "The plaintiffs in taking their appeal to this court have evidently considered and relied upon the written opinion of the trial judge as a final judgment in the cause, reviewable as such in this court, and the appeal has been briefed, argued and submitted on that assumption."

In citing *In re D'Arcy,* supra, with approval, that Court had this to say:

> "In view of Rule 58, we are constrained to hold that *the mere filing of the judge's opinion* in this case which is shown by the transcript of the record before us, *does not establish that a final judgment has been entered* which has been made effective in the manner prescribed by the Rules and which is reviewable in this court. If no judgment has been docketed, there is no judgment from which to appeal and the appeal is premature." (Emphasis supplied.)

The determination of whether the "Memorandum Opinion" can be construed as a final judgment within the meaning of R.C.P. Rule 58, depends upon the nature of the document and local practice. See *In the Matter of Forstner Chain Corp., Forstner Chain Corp. v. Marvel Jewelry Mfg. Co.,* 177 F.(2d) 572 (C.A. 1). The Court there observed:

> "An opinion is not itself a judgment, even though it contains conclusions of fact or of law, and foreshadows

how the judge intends to dispose of the case. Not infrequently, however, there is tacked on at the end of an opinion a sentence in mandatory language such as: 'The complaint is dismissed.' In the understanding and practice of the particular court, this concluding sentence may be the final judgment, the concluding judicial act or pronouncement disposing of the case, to be entered by the clerk forthwith. But not necessarily so. See Commissioner v. Estate of Bedford, supra, at p. 286. If it is the practice of the court to pronounce judgment in a more formal manner, in a separate document entitled 'Judgment', then the concluding sentence at the end of the opinion amounts to no more than a direction to the clerk for the preparation of the final judgment on behalf of the court; the formal judgment will then be signed or initialed by the judge or issued in the name of the court under the attestation of the clerk (whatever is the local practice), and not until then will the clerk make the entry of the judgment in the civil docket in accordance with Rule 79(a)."

The local practice, as set forth in Local Rule 5, requires that something be done beyond the mere filing of a memorandum opinion, to wit, the settlement and approval of the form of order or judgment (Rule 5(d)) and a specific direction to the clerk to enter the form of judgment or order so settled and approved (Rule 5(c)(3)).

It is respectfully submitted that the language of Local Rule 5 is clear and unambiguous in its requirements as to findings, conclusions and form of judgment and embraces the proceedings terminative of the contempt proceedings in the case at bar. If the rule cannot be taken at face value, then it is a snare and a delusion placing in jeopardy the rights of any and all who rely upon its apparent meaning.

With respect to opinions or memorandum orders for judgment Local Rule 5(e) calls for the lodging of a draft of findings of fact and conclusions of law by the prevailing party within five days after receipt of a written notice of such opinion or memorandum. The rule then goes on to provide for the lodging of proposed amendments by the adversary and eventual settlement by the Judge. *No such draft was lodged in the case at bar.*

With respect to a "decision of the Court giving any order which requires settlement and approval as to form," Rule 5(d) requires the prevailing party to prepare "a draft of the order or judgment embodying the Court's decision and present it for approval to each party who has appeared in the action." It then goes on to establish the procedure for approval or non-approval by the parties as to form; the proposal of modifications and finally the signing and filing of the judgment. *No such draft was lodged in the case at bar.*

It is respectfully submitted that the Local Rule 5 is entirely compatible with R.C.P. Rule 58 and is intended as a declaration of the local practice to work hand-in-glove with the Rules of Civil Procedure, of which the local rules are declared to be supplementary.* That being the case, the rule must be deemed to have a purpose and it was not adopted to be honored in the breach.

Further light on the "local practice" is shed by the fact that appellee found it necessary to implement the "Memorandum Opinion" by obtaining an order for writ of execution (Tr. pp. 97-98), which may be taken as an indication

*Local Rule 1 is prefaced by the statement: "These rules supplement the Federal Rules of Civil Procedure, which will be herein referred to as RCP."

that the clerk of the District Court did not regard the Memorandum Opinion as being in itself a final order or as containing within its four corners a sufficient directive as to his further acts.

The Fact That the Memorandum Opinion Acted Upon or Interpreted the Original Judgment Demonstrates Further Its Lack of Finality.

Conceding that under some circumstances and conditions a Memorandum Opinion could be a final, appealable order, it is clear that this is not true unless it disposes of all of the basic issues of the controversy.

Here, while the proceeding was termed a contempt proceeding, there is a question as to whether the Court below considered and treated the proceeding as such, or whether the Court considered and treated the proceeding as one seeking clarification and delineation of the original decree, and a measuring of the decree so clarified against the acts complained of, or whether the Court considered and treated the proceeding as one sounding in part in contempt and in part clarification, or expansion, of the original decree. This question is definitely posed not only by the nature of the Court's opinion, but by the nature of the relief sought by appellee, which was that appellant be adjudged to be in contempt and that the District Court enter a further order enjoining the defendant from performing certain acts (see Paragraph 3 of petitioner's prayer for relief, Tr. p. 26).

This in turn indicates that the Court may have looked through the form of the proceeding to its substance, and treated the matter as one allowing it to clarify and better define what it intended to enjoin by the original decree. If this were so, then the Court's reference to certain of defendant's acts as being violative of the decree is not neces-

sarily tantamount to a statement that defendant was in contempt. The Court's term "violative of the decree" is open to the construction that what was meant was that defendant's acts were violative of what the Court intended the decree to mean, but which was not clearly conveyed by its terms.

In any event, a basic issue was whether defendant disobeyed understandably clear terms of the original decree. This issue still remains and hence there has at yet been no final decision. If the terms were understandably clear, and defendant violated them, a specific adjudgment of contempt is required in order to make the Court's decision expressed in its Memorandum Opinion a final one. If, on the other hand, the terms of the original decree left a penumbral region within which it is clear only to the Court that defendant's presence is anathema, defendant is entitled to a specific adjudgment of non-contempt, even though this adjudgment be accompanied by further adjudgment that defendant cease doing certain acts because such acts will be henceforth considered to be violative of the original decree as it is now expanded and clarified.

Setting Paragraph XIII of the Judgment (Tr. pp. 16-17) and the penultimate paragraph of the Memorandum Opinion in apposition provides a clear demonstration that the District Court was, in fact, clarifying or expanding the original judgment. Thus, the order that appellee:

> "forthwith cease and desist from manufacturing and selling any squeegees or handles thereof marked with the word 'Steccone' used alone, or *in connection with other words or symbols which do not clearly indicate that they are not the product of the Morse-Starrett Products Co.*" (Emphasis supplied.)

differs in kind and specie from the judgment proviso:

> "that defendant may make, advertise and sell squeegees as the products of Steccone Products Co., or as defendant's product, so long as the name 'Steccone', used alone or in conjunction with other words or symbols, on the squeegees or in the written advertising thereof, *is accompanied by sufficient explanatory material so as to clearly differentiate it from the product manufactured and sold by plaintiff.*"

It will thus be seen that the judgment proviso required that "STECCONE," used alone or in conjunction with other words or symbols, must be *accompanied by sufficient explanatory material,* whereas the Order of the opinion placed the job of differentiation upon the shoulders of the *words or symbols* used, in connection with "STECCONE."

In such a situation the need for findings, conclusions and a settled form of judgment is self-evident. Without them an appellate tribunal could not hope to be adequately informed, nor could the contemnor proceed except with the constant peril of further interpretation and expansion of the original judgment to feed it with its intended but unexpressed meaning. The appellate court could not divine the propriety of the particular proceeding and ruling to determine whether the violation was dependent upon "plain facts of intendment to violate the decree" (cf. *Terminal R.R. Assn. v. U. S.,* 266 U.S. 29; *One-Two-Three Company, Inc. v. Tavern Fruit Juice Co., Inc.,* 54 F.S. 574, 60 U.S.P.Q. 488, 491) or whether the appellee should have been relegated to a suit for alleged infringement (cf. *California Artificial Stone Paving Co. v. Molitor,* 113 U.S. 609-618).

CONCLUSION

For the reasons set forth, it clearly appears that the District Court erred in treating its July 31st, 1950 Memorandum Opinion as a final, appealable order and in denying appellant's motion for entry of judgment. There is nothing so unusual about a constructive contempt proceeding as would except it from the plain meaning of R.C.P. Rule 58 and Local Rule 5 and it definitely appears that the requirements of these rules have not been served or met. In matters of constructive contempt the very nature of the proceeding furnishes a compelling reason why the final disposition should abide by the rules which have been set up in the interests of the proper administration of justice, for rules of conduct or curbs upon a party should never be left to speculation and doubt.

Assuming, *arguendo,* that contempt proceedings were an exception to the rule requiring findings of fact, conclusions of law and a settled form of judgment, the Memorandum Opinion in the case at bar would, in and of itself, take the case out of such exception, because as above pointed out, the District Court was in such Memorandum Opinion acting upon the original judgment to clarify or expand it, and so far as the clarification or expansion is concerned, the proceeding was something more than a contempt proceeding.

It is respectfully argued that the District Court Order denying the appellant's Motion to Enter Judgment should

be reversed and the case remanded for further proceedings consistent with the spirit and intent of the applicable rules.

Respectfully submitted,

NAYLOR AND LASSAGNE
JAS. M. NAYLOR
Attorneys for Appellant.

FRANK A. NEAL
Of Counsel.

Dated April 20, 1951.

(Appendix follows)

APPENDIX

LOCAL RULE 5

(United States District Court for the Northern District of California)

* * * * * * *

(c) *Entry of Judgments and Orders.* (1) The notation of judgments and orders in the civil docket by the Clerk shall in all cases be made at the earliest practicable time. The notation of judgments will not be delayed pending taxation of costs, but a blank space may be left in the form of judgment for insertion of costs by the Clerk after taxation.

(2) Orders and judgments under subdivisions (a) and (b) of this rule will be noted in the civil docket immediately after the Clerk has signed them. The Clerk may require any party obtaining a judgment or order which does not need to be approved as to form by the Judge, to supply him with a draft thereof.

(3) Except in the instances enumerated in subdivisions (a) and (b) of this rule, no judgment or order will be noted in the civil docket until the Clerk has received from the Court a specific direction to enter it. Unless the Court's direction is given to the Clerk in open Court and is noted in the minutes, it should be evidenced by the signature or initials of the Judge on the form of judgment or order.

(4) Every order and judgment shall be filed in the Clerk's office. Where the Clerk has requested a draft, or where the form of an order or judgment has been settled by the Court, a copy must also be delivered to the Clerk for addition to the civil order book.

(d) *Settlement of Orders and Judgments by the Court.* Within five days of the decision of the Court giving any order which requires settlement and approval as to form, the prevailing party shall prepare a draft of the order or judgment embodying the Court's decision and present it for approval to each party who has appeared in the action. Each party shall examine it at once, and if he approves, endorse with the words, 'Approved as to form, as provided in Rule 5(d),' and append his signature thereto. Such endorsement shall not affect the rights of any party, but shall be considered only as an indication to the Judge that the form is correct. If any party does not approve, he shall endorse with the words, 'Not approved as to form, as provided in Rule 5(d),' specifying his reasons. The party proposing the order or judgment shall thereupon serve a copy upon each other party, and lodge the original and one copy with the Clerk. Each party who disapproves the order or judgment shall have five days within which to serve and lodge with the Clerk proposed modifications thereof. If all parties approve, or if no modifications are presented within said five days, the order or judgment, if approved by the Judge shall be signed and filed by him. If any proposed modifications of the order or judgment are presented as herein provided, the Judge shall order such modifications made as he deems proper. If the attorney for the prevailing party fails to observe the above provisions, any attorney in the case may submit to the Judge a draft of the proposed order or judgment.

(e) *Findings of Fact and Conclusions of Law.* Within five days after receipt of written notice of an opinion or memorandum order for judgment, the prevailing party shall

prepare a draft of the findings of fact and conclusions of law and lodge them with the Clerk, serving a copy upon the adverse party, who may within five days thereafter file with the Clerk and serve upon the prevailing party his proposed amendments. If the adverse party proposes no amendments he may endorse his approval on the original draft, which may then be presented immediately to the Judge for his signature.

If the prevailing party fails to lodge and serve his draft within five days, the adverse party may proceed within five days thereafter as herein provided.

The findings of fact and conclusions of law shall thereafter be settled by the Judge, and when so settled shall be signed by him and filed.

* * * * * * *"